

Village of Central Square Zoning Board of Appeals
Public Hearing
Monday, August 30, 2010

Attendance: Chairman Mike Sperling, Board Member Deborah Worlock, Board Member Tyler Gervaise, Board Member Jack Monica, Code Enforcer Mark Bombardo, Mayor Murphy, Kevin Caraccioli, Esq. (attorney for the village), John R. Langey, Esq. (attorney for Donald Penoyer), Secretary Brandy Hickman, Trustee Heather Stevens, Donald Penoyer, Chad Penoyer, Ken Sherman, Barbara Davis, Kathy Wildrick, and Mike Wildrick.

Chairman, Mike Sperling made a motion to call the hearing to order at 7:03 p.m.

The Pledge of Allegiance was led by Chairman Mike Sperling.

Chairman, Mike Sperling read the public notice regarding the rescheduling of the August 17, 2010 hearing to tonight's August 30, 2010 hearing.

Being that the hearing was now open for comment, attorney John Langey made the opening statement on behalf of his client, Donald Penoyer of Dignity Plus. Mr. Langey stated that the "sign" was previously approved by the Zoning Board, and that the issue is not brightness, flashing lights or the contents of the messages. He also states that Mr. Penoyer received a correspondence dated April 29, 2010 from Code Enforcement Officer Mark Bombard citing that the sign was in violation of the Village Codes regarding signage/billboards. Mr. Langey then made an appeal for the Board to consider the original variance.

Mr. Langey presents that it is his opinion and that of Mr. Penoyer that the problem lies with the following:

1. That the ads run for outside business & events.
2. That the Village of Central Square's Billboard law is unconstitutional.

3. That if they do need a variance to keep the sign as it is then could they have variance for Commercial Speak.

Mr. Langey then questions the Board about whether they agree with Mark Bombardo relative to the commercial speech of the sign, thus making it a Billboard. But before the Board could respond he went on to ask that the Zoning Board and attorney Kevin Caraccioli consult with the Village Board about the case law already on record regarding billboards. He then stated that no billboard would have to be included in a grandfather clause of the variance since he was already approved to have the sign display time, temperature and a message before the law went into effect.

A poster board collage of pictures showing the other signs that occur within Central Square was submitted for the record by Mr. Langey and his client. It is their position that no environmental harm is caused by the content of messages or ads run on the sign. He says that the sign has been up for a few years & no extra accidents or detriment to community has occurred.

Deborah Worlock asks for evidence that Mr. Penoyer was given a variance with no restrictions. John Langey directs her to exhibit 4 (The Zoning Board of Appeals minutes of the August 21, 2007 public hearing where they were granted actual approval of the original variance application submitted in 2007. Exhibit 5 is said 2007 application showing that Mr. Penoyer told them in writing that the sign would display time, temperature and messages.

Deborah Worlock reads from exhibit 4 and points out that the 8/21/07 minutes say that discussion was held about actual messages possibly slowly fading in and out, not to be flashing and should similar to Pathfinders Bank display, so as to be less distracting to the traffic in the Square.

Tyler Gervaise asks Mr. Donald Penoyer and his attorney John Langey point blank "Yes or no. Do you get paid for the advertisements displayed on the board?" They said that they didn't have to answer the question because under Central Square law they are not obligated to disclose that information and that they are not here to discuss anything except what they were Noticed into the hearing for (by Code enforcer Mark Bombardo) which was Commercial Code because Mr. Penoyer runs ads on the sign making it a billboard.

Mr. Langey then brought up the constitutionality of Central Square's signage/billboard laws and how it violates freedom of speech. Board Member Tyler Gervaise responded by saying that the Zoning Board as a body isn't here to decide on federal law.

Jacque Monica read from the July 20, 2010 Planning Board minutes regarding sign usage.

John Langey asks how the sign is hurting the village.

Deborah Worlock says that the ads hurt the village because they are promoting out of town business.

Mr. Langey brings up the constitutionality of commercial speech and Tyler Gervaise reiterates that the ZBA is not here to interpret federal law.

Mark Bombardo asks whose interpretation of the village code is correct? His or Donald Penoyer's interpretation.

Jacque Monica mentions that he lives in the village near Dignity Plus where the sign is located and his neighbors complain to him about the flashing & bright colors distracting them while driving, especially at night. The white backgrounds are blinding and the light put out by the sign is so powerful that it reflects off the old buildings down County Route 12. The village code states that the sign cannot produce more than 5 candle feet of light and that he is an IT specialist and can attest that the sign puts out more wattage than is allowed by that law. This in itself creates impaired vision. So in his opinion it has nothing to do with free speech. He then asks Mr. Penoyer to please just tone down the sign. Jacque says he doesn't care about the ads.

John Langey states again that they're not here to answer ZBA questions or discuss anything except for Commercial Code.

Tyler Gervaise asks again, "Are there ads being sold. Do you, Mr. Penoyer receive monetary compensation for the ads your run. John Langey answers by saying, "YES some ads are sold but some are free like promoting the concerts in the park."

Chairman, Mike Sperling says to John Langey, "Go back 9 months when it was brought to Don's attention that the village had a problem with the sign. Why did he not complain about free speech at that time?"

Mike Wildrick, a resident and the former Code Officer for the village, spoke about the case law that Mr. Langey presented. Said case law is referring to large towns with a lot of open land which made him think that it might not be applicable to a small village because it refers to a township not a village like Central Square. The case law talks about the effect on a big town or a sign being by the interstate rather than a small village.

Trustee, Heather Stevens said that while helping out at the village office today she received 3 concerns from village citizens and would like to have them read into record.

Concerned citizen No. 1: Kay Buschle- Wants sign to stay but use as intended (community events, alerts, Dignity Plus business info) not as a billboard to advertise other businesses or to make a profit from selling advertisements.

Concerned citizen No. 2: Mike Dixon- The sign is a distraction to drivers, creates dangerous/hazardous situations, it is too bright and flashing.

Concerned citizen No. 3: Terrie Osborn- With all due respect to Don (Penoyer), and this is nothing personal, in my opinion, the sign creates a flashy, garish, Las Vegas or Time Square look/feel to the center of the village –which in my opinion, is incongruent with the concept of Central Square as a small, rural village.

Resident Barb Davis, a resident in attendance, spoke about billboard changing the village. It is affecting residents by distracting them while they're driving. She states she has mixed feeling on board and its largeness and the feeling that it gives the village. Maybe we should compromise so that business can succeed. She hates the sign, but wants businesses in our community to succeed. She poses the question: Can Mr. Penoyer at least work on the flashing?

Resident John Urbaniak, a resident in attendance, stated that he had nothing against the sign personally, but went on to say that he became mesmerized by sign and didn't react when the signal light turned green, creating even more distraction for drivers. He questions the constitutionality

of the sign and wonders if the Zoning Board of Appeals can judge that issue or if it was strictly for the federal court to interpret.

Attorney Kevin Caraccioli submits the following into record: Commercial Speech, usually in the form of advertizing, enjoys some First Amendment protection, but not to the same degree as that which is given to noncommercial forms of expression. Generally, the First Amendment protects commercial speech that is not false or misleading and that does not advertise illegal or harmful activity. Commercial speech may be restricted only to further a substantial government interest and only if the restriction actually furthers that interest. **In Central Hudson Gas & Electric Co. v. Public Service Commission**, 447 U.S. 557, 100 S. Ct. 2343, 65 L. ed. 2d 341 (1980), the U.S. Supreme Court held that a statute banning promotional advertising by Public Utilities was unconstitutional. That case set forth a “general scheme for assessing government restrictions on commercial speech.” Commercial speech will be protection by the First Amendment if:

1. It concerns lawful activity and is not misleading;
2. The asserted government interest is not substantial;
3. The regulation does not directly advance the asserted governmental interest; and
4. The regulation is more extensive than is necessary to serve that interest.

The Supreme Court has struck down bans on drug advertising, (*Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002) and tobacco advertising, *Lorillard Tobacco Corp. v. Reily*, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001), using this test.

Kevin Caraccioli then questions whether Mr. Penoyer thinks that the village has an overarching reason for concerns or interest in sign. Mr. Penoyer responded by saying no.

Kevin Caraccioli then read from Village Code section 250-18-A and stated that he was just trying to understand Mr. Penoyer’s objections.

John Langey is concerned were meeting is going. That he’s only here for what he was cited for, which does not have anything to do with the

brightness or flashing of the sign. He questions what is the harm of the commercial speech?

Jacque Monica says it's no longer a sign. It's a billboard and we didn't approve of such.

John Langey asks the Board "why can't we have a resolution?" Do we have to refer sign variance to the State of New York?

Resident, Barb Davis speaks about what the village laws say and wonders if we're going to have to write, in specific detail, all the things that the sign is allowed to say and will that language be the same for all other businesses in the village.

Mark Bombardo says that the businesses need to individually get a variance from Village Code 258 E (stating all new billboards prohibited).

Heather Stevens says that the ads are a detriment because they direct business away from the town.

Chairman, Mike Sperling asks the other board members if they have anything further to add to the discussion. All said no and that they were finished.

Chairman, Mike Sperling closes hearing @ 8:00 pm and opens the actual Zoning Board of Appeals meeting.

At the close of the Public Hearing, Donald and Chad Penoyer, and Attorney John Langley excuse themselves since no further discussion regarding the billboard shall take place tonight within the regular ZBA meeting.

Mark Bombardo asks the board to declare themselves the lead agency for the purpose of determining environment action (SQRA) because Mr. Penoyer has submitted a new application for variance on a billboard.

Chairman, Mike Sperling makes motion that the ZBA become lead agency. Tyler Gervaise seconds motion. Board polled, all in favor.

Tyler Gervaise makes motion to enter into an Executive Session with Kevin Caraccioli because there was a mention by John Langley of potential litigation brought forth by Donald Penoyer and also to discuss the legal

ramifications of a lawsuit. Jacqu Monica seconded the motion. Board polled, all in favor.

Executive session begins at 8:05 pm.

Tyler Gervaise makes a motion for Attorney Kevin Caraccioli to create a template for a Resolution that includes timeline/deadline guides.

Chairman, Mike Sperling makes a motion to close the Executive Session. Tyler Gervaise seconds the motion. Board polled, all in favor.

Executive Session ends at 9:00 p.m. and regular meeting begins.

Jacque Monica makes a motion to set the next meeting to consult with our attorney Kevin on Tuesday, September 21, 2010 at 7:00 p.m. Deborah Worlock seconded the motion.

Tyler Gervaise questions whether the others are ok with Donald Penoyer selling advertisements. No one agrees with the ads. Kevin Caraccioli says maybe we can modify village code regarding commercial districts and industrial districts, but states that it would be for the Village Board to decide not the Zoning Board of appeals to decide.

Minutes of the August 17, 2010 meeting were read. Chairman, Mike Sperling makes motion a motion to approve said minutes. Tyler Gervaise seconds the motion. Board polled, all in favor.

The Board made a decision to keep the picture board, submitted into record by Donald Penoyer, at the Central Square Codes Office.

Jacque Monica made a motion to adjourn the regular ZBA meeting at 9:25 p.m. Tyler Gervaise seconded the motion.

Respectfully submitted,

Brandy Hickman, Secretary